

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY NERCESIAN, as	:	CIVIL ACTION
administrator of estate of	:	
Richard M. Nercesian	:	
	:	
v.	:	
	:	
JENNIFER M. JOHNSON	:	NO. 01-3129

MEMORANDUM

Dalzell, J.

February 7, 2002

Jeffrey Nercesian here sues as executor of the will¹ of Richard M. Nercesian, who died when defendant Jennifer M. Johnson's car allegedly struck him. Ms. Johnson has moved to dismiss or, in the alternative, for summary judgment for lack of jurisdiction over the subject matter.

The complaint bases jurisdiction on diversity of citizenship. The parties do not contest that Ms. Johnson is a citizen of Pennsylvania, nor do they question that the late Mr. Nercesian was at one time a citizen of New Jersey. The sole issue in dispute, and on which our jurisdiction depends, is Richard Nercesian's citizenship at the time of his death. While his executor-son maintains that his father was a citizen of New Jersey, Ms. Johnson contends that Mr. Nercesian changed his citizenship to Pennsylvania shortly before the fatal car accident.

¹ Although the caption refers to Jeffrey Nercesian as "administrator" of his father's estate, at the February 4, 2002 hearing we established that he was appointed executor in his father's will.

We held an evidentiary hearing on February 4, 2002 to resolve this dispute.

I. Legal Standard

The legal landscape is relatively clear. We have diversity jurisdiction only if each plaintiff is a citizen of a different state than each defendant. 28 U.S.C. § 1332; Strawbridge v. Curtiss, 7 U.S. 267 (3 Cranch) (1806); Bumberger v. Ins. Co. of N. Am., 952 F.2d 764, 767 (3d Cir. 1991). When a legal representative sues on behalf of a decedent, the citizenship of the decedent, not that of the legal representative, controls. 28 U.S.C. § 1332(c)(2). We determine citizenship as of the date the complaint is filed. Krasnov v. Dinan, 465 F.2d 1298, 1300 (3d Cir. 1972). In a suit on behalf of a dead person, the relevant date is when the decedent died. See, e.g., Walls v. Bastian, 832 F. Supp. 940, 942 (E.D. Pa. 1993) (inquiring into citizenship of decedent on date of fatal automobile accident).

Citizenship for this purpose is synonymous with domicile. Krasnov, 465 F.2d at 1300. A state is one's domicile if one (1) resides in the state and (2) intends to remain there. Id. at 1300-01; Diamant v. Genesis Assocs., No. 96-5342, 1997 U.S. Dist. LEXIS, at *2, 5 (E.D. Pa. 1997). These two factors must concur. "Thus, a definite and sincere intention to make a place one's home at some time in the future is not enough to make that place an individual's present domicile." Doe v. Ross, No. 94-6572, 1995 U.S. Dist. LEXIS 7560, at *4-5 (E.D. Pa. May 26,

1995) (quoting 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3613, at 549 (1984)). No minimum period of residency is necessary to acquire a domicile; as Judge Aldisert wrote for our Court of Appeals, "A citizen of the United States can change his domicile instantly.....He must take up residence at the new domicile, and he must intend to remain there." Krasnov, 465 F.2d at 1300; see also Walls, 832 F. Supp. at 942.

Although the analysis is necessarily case specific, courts have looked to certain factors, including state of employment, voting, taxes, driver's license, bank accounts and assets, and civic and religious associations. 13B Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice & Procedure § 3612, at 530-31 (1984); Krasnov, 465 F.2d at 1301; EMC Global Techs., Inc. v. Alavezos, No. 01-1289, 2001 U.S. Dist. LEXIS 5886, at *3 (E.D. Pa. May 7, 2001).

The party asserting federal jurisdiction bears the burden of proving it exists. See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-83 (1936); Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990). Jeffrey Nercesian thus bears the burden of proof that his father was a citizen of New Jersey when he died.²

² We pause briefly to address an issue not raised. Although our Court of Appeals has not formally embraced the principle, district courts have applied a presumption of continuation of established domicile. E.g. DeTolla v. Mele, No. 99-1312, 1999 U.S. Dist. LEXIS 3427 (E.D. Pa. Mar. 19, 1999); (continued...)

II. Findings of Fact

Based upon the testimony and exhibits received, the following constitute our findings of fact.

Richard M. Nercesian Sr. lived most of his life in Delaware County, Pennsylvania. Beginning in 1997, Nercesian lived in New Jersey, residing in various towns. Toward the end of his life he lived with his girlfriend, Joyce English, in her homes at 419 Bay Avenue, Somers Point, New Jersey and then 2155 Shore Road, Linwood, New Jersey.

On November 17, 2000, he died when a car struck him in Radnor, Pennsylvania. For two to three weeks before his death, Nercesian lived in the condominium of his son, Richard, Jr., in

²(...continued)

Walls v. Bastian, 832 F. Supp. 940 (E.D. Pa. 1993); Liakakos v. Cigna Corp., 704 F. Supp. 583, 586 (E.D. Pa. 1988). "Where a person has changed his residence, a presumption in favor of the original domicile arises." Walls, 832 F. Supp. at 942. The presumption favors a proven domicile over a claimed newly acquired one.

The presumption does not aid our analysis here. In our case, where the presumption favors the same party on whom the burden of proving jurisdiction falls, it operates to alter the burden of production, but not the burden of persuasion. Liakakos, 704 F. Supp. at 586-87; Onge v. McNeilus Truck & Mfg., Inc., 645 F. Supp. 280, 281-82 (D. Minn. 1986). "The burden of persuasion as to diversity jurisdiction remains at all time on the proponent of jurisdiction." Walls, 832 F. Supp. at 941 n.3; see also Krasnov, 465 F.2d at 1299. We convened the hearing precisely because defendant presented a genuine issue that Richard Nercesian changed his domicile from New Jersey to Pennsylvania, and thus satisfied her burden of production. The burden in favor of Nercesian's preexisting domicile is thus no longer of moment.

Broomall, Pennsylvania.³ The father slept on the couch in the living room. Richard, Jr. learned after his father's death (from the father's girlfriend, Joyce English) that his father had clothing and belongings in New Jersey and also owned a boat docked in Linwood, New Jersey. Richard Nercesian did not, however, have a rental or ownership interest in any property in New Jersey.

Richard Nercesian began working as a car salesman for Wright Olds-Honda in Drexel Hill, Pennsylvania, on October 31, 2000. It was a full-time job.

Until his death, Nercesian père commuted to work from his son's condominium in Broomall. The commute to his job was 2.47 miles. In contrast, the distance between his girlfriend's home in Linwood, New Jersey, where he had lived, and Wright Olds-Honda was 79.79 miles.⁴

³ Richard Nercesian Jr., with whom Nercesian lived, remembers the time as "about a week". In contrast, plaintiff and Nercesian's other son, Jeffrey, place the time as about a month. Richard Nercesian Jr. readily admits that he cannot recall this precisely. Indeed, his cloudy memory of the period is not surprising given the trauma associated with that time. He links the date his father began living with him with the time his father began working - recalling them both as a week before his death. His father commuted from the condominium in Broomall to work. Since it is now established from the employer's records that Richard Nercesian began work on October 31, 2000, we deduce that he began living in Pennsylvania when he started his new job.

⁴ We entered the addresses of the residences - 1 Lawrence Road, Broomall, Pennsylvania, 19003 and 2155 Shore Road, Linwood, New Jersey 08221 - and of the workplace - Burmont Road & Township Line Road, Drexel Hill, Pennsylvania, 19026 - into Mapquest, at <http://www.mapquest.com> (last visited Feb. 5, 2002).

When he began his new job, the elder Nercesian complied with Pennsylvania licensing requirements, and thus applied for, and obtained, a certificate as a vehicle salesperson. He also applied to renew his Pennsylvania vehicle operator's license, which had expired in 1993.

During the brief period of his return to the Commonwealth until his untimely death, Richard Nercesian attested to being a Pennsylvania resident on several documents. On his IRS W-4 form, filled out on October 31, 2000, he listed his "home address" as #1 Lawrence Rd. Broomall, Pa. 19008. On his Employment Eligibility Verification form, completed under penalty of perjury, he also gave as his home the address in Broomall. Similarly, Nercesian applied for insurance with two different carriers, in both instances providing the same Pennsylvania address. He reported Broomall, Pennsylvania as his home address on Wright Olds-Honda's "new hiring report form."⁵

Richard Nercesian had family connections in Pennsylvania, including grandchildren and at least one son. He participated in Pennsylvania community groups, such as the Men's Club and St. Gregory's Church in Roxborough.

At the time of his death, Richard Nercesian still carried a valid New Jersey driver's license. The police accident report listed his address as Linwood, New Jersey, while the

⁵ While it is true that the elder Nercesian did not actually receive mail while he lived in the condominium in Broomall, after his death mail addressed to him arrived there.

hospital emergency report listed his home as Somers Point, New Jersey. Nercesian's death certificate showed a mailing address of Linwood, New Jersey. One of the decedent's sons, probably Richard, Jr., supplied this information to those authorities.

Nercesian's son and executor, Jeffrey, moved to probate his father's will under Pennsylvania law, stating:

With regard to residency of my father, Richard Nercesian. He lived in Delaware County his entire life with the exclusion of the three years prior to his death. One month directly proceeding [sic] his death he moved back and took residence with my brother at his condominium. Located at 1 Lawrence Rd., Apt. A2A Broomall PA, 19008. We would like to probate his will here in Delaware County where he spent most of his life.

Def.'s Supp. & Add. to Mot. to Dis. (Doc. No. 13), Ex. A. The will was so probated.

III. Discussion

As noted, it is undisputed that for just under three weeks until his death, Richard Nercesian lived in Broomall, Pennsylvania in the condominium of his son, Richard, Jr. Even this brief residency will establish Pennsylvania as Nercesian's domicile, if accompanied by intent to remain, the factor to which we now turn. Krasnov, 465 F.3d at 1300; Walls, 832 F. Supp. at 942.

By his own actions, Nercesian demonstrated an intent to remain indefinitely in Pennsylvania. He acquired a job in Pennsylvania, worked full-time in the Commonwealth, and commuted

daily between Broomall and his new job. Employment in a state weights significantly in determining intention to stay. Krasnov, 465 F.3d at 1301-03 (involving itinerant religious teacher relocating to Bethlehem, Pennsylvania teaching post). When one acquires a job in another state and simultaneously moves there, few English speakers would describe such a relocation as really only a visit. Nercesian took pains to secure ongoing Pennsylvania employment, complying immediately with Commonwealth licensing requirements governing vehicle salespersons, and enrolling in two employee-benefit plans. We also note the convenience with which Nercesian commuted to his job: the Broomall condominium was three miles from his job, while the Linwood, New Jersey address was eighty miles away.

Nercesian had significant family connections in Pennsylvania, where he was born and lived continuously until three years before his death. He was a member of St. Gregory's Church and the Men's Club. See Walls, 832 F. Supp. at 943 (considering emotional connections); Doe, 1995 U.S. Dist LEXIS, at *5 (emphasizing professional and personal attachments); 13B Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice & Procedure § 3612, at 530 (1984) (considering membership in clubs and churches).

Most important of all, Richard Nercesian's own declarations confirm his intention to stay in Pennsylvania. In the brief time he resided in Pennsylvania, he repeatedly declared the Commonwealth to be his home. See his W-4 tax form,

employment eligibility verification form, employment questionnaires, applications for health insurance, and applications for Pennsylvania car salesperson licenses.

It is true that plaintiff elicited at the hearing that some of the decedent's belongings remained in New Jersey with his girlfriend while he lived in Pennsylvania with his son. This is not terribly surprising, since the elder Nercesian had only been living in Pennsylvania for three weeks and had not yet secured a place of his own. Notably, plaintiff presents no other evidence that his father intended to return to New Jersey or intended to reside in Pennsylvania and New Jersey.

Plaintiff argues that "[t]he testimony is hardly convincing as to decedent's intention to become a citizen of Pennsylvania. To the contrary, the testimony is replete with references to the transient lifestyle of the decedent. This is apparent from decedent's various residences within New Jersey, his various jobs and business ventures and his various personal relationships, all within the few years immediately preceding his death." Pl.'s Mem. L. in Opp. to Mot. to Dismiss, at 3. These contentions miss the point. Richard Nercesian need not have intended to remain in Pennsylvania permanently, but only indefinitely. Krasnov, 465 F.2d at 1300, 1303. The record that Richard Nercesian himself left confirms that, when he died, he saw himself a Pennsylvanian.

Since plaintiff has not proven that the decedent at his death was a citizen of a state different than the defendant, he

has not carried his burden of establishing diversity of citizenship. We will therefore dismiss the case for want of jurisdiction over the subject matter.

JEFFREY NERCESIAN : CIVIL ACTION
:
v. :
:
JENNIFER M. JOHNSON : NO. 01-3129

AND NOW, this 7th day of February, 2002, upon consideration of defendant's motion to dismiss or, in the alternative, for summary judgment (docket no. 10), plaintiff's response thereto, and after a hearing on February 4, 2002, and upon the findings of fact and conclusions of law set forth in the accompanying memorandum, it is hereby ORDERED that:

- BY THE COURT:

Stewart Dalzell, J.